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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:)
Request for Regulatory) 1998 OAL Determination No. 30
Determination filed by)
KAREN SCHAMBACH) [Docket No. 93-005]
regarding a Manual of the)
CALIFORNIA DEPARTMENT) October 30, 1998
OF PARKS AND RECREATION)
entitled "Application) Determination Pursuant to
Procedures ---Off-Highway) Government Code Section
Motor Vehicle Recreation Act) 11340.5; Title 1, California
of 1988, Off Highway Vehicle) Code of Regulations,
Grants Program") Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
RAYMOND G. SAATJIAN, Staff Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a Department of Parks and Recreation ("Department") manual concerning the processing of grant requests to manage state property used by off highway vehicles, contains "regulations" which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). OAL has concluded that the Manual is a compilation of restatements of existing law, a collection of non-regulatory "forms" and in some cases "regulations" as defined by the APA.

If the Department chooses to publish and distribute the Manual to prospective applicants for state grants to manage recreational areas, trails and other park facilities in California where off-highway vehicles are use, it may adopt regulations pursuant to the APA.

ISSUE

Karen Schambach, a private individual,¹ has filed a request with the OAL on behalf of Friends Aware of Wildlife Needs ("FAWN"), to determine whether the Manual, "Application Procedures Off-Highway Motor Vehicle Recreation Act of 1988--Off Highway Vehicle Grants Program" ("Manual") contains "regulations" which are required to be adopted pursuant to the ("APA").²

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF PARKS AND RECREATION?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

"As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, *department*, division, bureau, board, and commission."
[Emphasis added.]

The APA narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative department of the state government."³ The Department is in neither the judicial nor legislative branch of state government.⁴ Clearly, the Department is a "state agency" within the meaning of the APA, and unless the Department is expressly exempted from the APA,⁵ the APA is generally applicable to the Department. Since no specific exemption has been enacted, the APA is generally applicable to the Department.

II. DOES THE “MANUAL” CONTAIN “REGULATIONS” WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines “regulation” as:

“... every rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations,” and thus subject to APA adoption requirements, provides in part:

“(a) No state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, *manual*, instruction, order, standard of general application, or other rule, which is ['] regulation['] as defined in subdivision (g) of Section 11342, *unless the* guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].” [Emphasis added.]

In Grier v. Kizer,⁶ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, or
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" [Emphasis added.]

Background of the "Manual"

The Legislature enacted the "Off-Highway Motor Vehicle Recreation Act of 1982" ("1982 Act"),⁷ and its successor legislation, the "Off-Highway Motor Vehicle Recreation Act of 1988" (1988 Act),⁸ whose provisions were codified in the Public Resources Code,⁹ to address the "ever-increasing popularity" of off-highway vehicles and their impact "on the environment, wildlife habitats, native wildlife, and native flora."¹⁰

The Legislature further provided in the 1988 Act for an "Off-Highway Motor Vehicle Recreation Commission" ("Commission")¹¹ within the "Off-Highway Motor Vehicle Recreation Division"¹² under the Department. The Commission was charged with various responsibilities, including the task of supervising the awarding of grants for the following uses:

"[G]rants may be made to cities, counties, and appropriate districts for the planning, acquisition, development, construction, maintenance, administration, operation, and conservation of trails, trailheads, areas, and other facilities for the use of off-highway motor vehicles that are in accordance with local plans and any plans for off-highway motor vehicle recreation areas and trails prepared by the division and for the enforcement

of laws and regulations regarding the use of off-highway vehicles within the project site." [Emphasis added.] ¹³

In an effort to implement portions of the 1988 Act that required the Department to establish a process for the awarding of financial grants, the Department, on October 28, 1991, published the Manual entitled *"Application Procedures, Off-Highway Motor Vehicle Recreation Act of 1988, Off-Highway Vehicle Grants Program."*¹⁴

In a letter dated June 18, 1992 the requester challenged the validity of the Manual, claiming that it was essentially an underground regulation, that established, among other things, certain criteria, guidelines and formulas, for the awarding of financial grants---a document that was not processed pursuant to APA requirements, and as such, should be determined by the OAL to be legally invalid.

A. IS THE CHALLENGED "MANUAL" A "STANDARD OF GENERAL APPLICATION?"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁵

The 1988 Act expressly provides that "[g]rants may be made to cities, counties, and appropriate districts. . . .,"¹⁶ which leaves little question that the standards of eligibility for grant requests made to the Department apply to *all* cities, *all* counties and *all* appropriate districts which desire to participate in the Off-Highway Vehicle Recreation Program. OAL therefore concludes that the challenged document, the Manual, is a standard of general application and has satisfied the first part of the two-part test. Next, OAL will consider the second part of the test.

B. DOES THE "MANUAL," WHICH IS A STANDARD OF GENERAL APPLICATION, ALSO INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

The Department stated in its response that:

"the manual's basic purpose is to provide the process and forms for local and federal agencies to compile and submit their projects for inclusion in the annual Governor's Budget."¹⁷

In its response, the Department argues that:

"[t]he manual is in the nature of a process document and does not establish a rule or standard of conduct for the grant program, the specific grants that may be funded, or how the local or federal agencies are to carry out the specific grants. The manual provides information, steps, and forms for completing the application process."¹⁸

And, finally, the Department further argues that:

"the manual, thus, serves in the nature of a request for proposals, analogous to the competitive process for services contract under the California Public Contract Code. To our knowledge, requests for proposals do not fit within the definition of a regulation as promulgated in Government Code section 11342 (g)."¹⁹

OAL disagrees with the Department's characterization of the Manual as a benign list of "*process and forms*" deserving of an exemption from the rulemaking and review process. OAL offers the following examples that suggest that while the Manual may, in part be a restatement of existing law and in other parts contain some non-regulatory forms, the Manual clearly contains a compilation of "rules" that "implement, interpret, or make specific the law enforced or administered by [the agency], or govern [the agency's procedure]."²⁰

Example No. 1 ----- "Schedules," "due dates"

The Manual lists several schedules, including one entitled "*Annual Application Schedule, Off-Highway Vehicle Grants Program, California Department of Parks and Recreation*."²¹ For example, this specific schedule requires that grant applicants submit the following documents by specific dates: "January 1, Letter of Intent Due (see important note below)," and, "March 1, Formal Grant Applications Due (all agencies)."

The Manual also describes a schedule entitled "*Project Funding Cycle*" which likewise sets specific dates for the submission of documents by grant applicants, as well as specific dates when the Department will take certain action.²² For example:

"The State must *receive* a 'Formal' Application package by March 1 (Day 60). This does not commit the applicant to the project. It can be withdrawn, in writing, any time prior to funds being appropriated in the State Budget. Local agencies must submit a resolution from the governing body withdrawing the application. [Emphasis in original.]"²³

In each of the two examples, the schedules establish due dates for the submission of various documents, including letters of intent, upon which various state agencies must act, including the making of certain findings. These schedules, time frames, and due dates are clearly intended to implement and make specific the provisions of the Off-Highway Motor Vehicle Recreation Program, especially for those individuals who are interested in acquiring grants to implement the 1988 Act.

The Department implements the 1988 Act by establishing due dates for various documents, which are standards of general application that affect *each and every city, county and appropriate district*, beyond the Department, and as such should be considered "regulations" subject to the APA.

In support of OAL's conclusion that portions of the Manual that implement "timetables" and "application" procedures are "regulations" subject to the APA, OAL relies upon the criteria for "manuals" discussed in *City of San Marcos v. California Highway Commission* ("*San Marcos*").²⁴ In the *San Marcos* decision, the California Highway Commission sought to establish an arbitrary cut off date for the submission of applications from cities interested in sharing in "grade allocation funds."

The City appealed an adverse decision of the California Highway Commission denying the City's fund request, which was deemed to be *untimely*. The Court of Appeal agreed with the City's claim that the Commission had not complied with the APA in properly adopting rules that took the form of a deadline for the receipt of applications from interested parties, and accordingly ruled that due dates

constitute standards of general application which implement the Department's enabling act and are thus subject to the APA.

Example No. 2 ----- "Evaluation Criteria"

The Manual describes an item entitled "*Evaluation Criteria. Off Highway Vehicle Grants Program*" with the following notation. "The following items will be used, as applicable, to evaluate OHV grant applicants and applications: (1) Cost-Benefit. . . (2) Demand. . . (3) Applicant Participation. . . (4) Stewardship.... (5) Implementation. . . (6) Support. . . (7) Useful Life. . . (8) Phase. . . (9) Future Commitment. . . (10) Application Content."²⁵

The title alone, "*Evaluation Criteria*," suggests that the Department has established certain performance criteria and a standard of judgment that will be used to compare and evaluate information solicited from applicants seeking financial grants from the Department. The APA specifically refers to those agency rules which shall not issue "unless the guideline, *criterion*, bulletin, manual . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."²⁶ [Emphasis added.]

Empowered by the 1988 Act, the Director of the Department, acting alone, would arguably have the lawful authority to select grant recipients based solely upon factors set forth in the governing statutes. However, if the Director chose to adopt additional criteria, or consider information that would be supplemental to a literal interpretation of the statute, then any supplemental criteria would need to be formally adopted pursuant to the APA. A fundamental objective of the APA is to insure that when a state agency intends to implement a state statute by specifying the process to be used in the selection of a grant recipient in this case, the agency must provide a notice to and opportunity for the public to be heard and to participate in the policy development process.

OAL finds that no such opportunity was accorded the public in the Department's adoption of the Manual. As was noted in a California Supreme Court decision, *Armistead v. State Personnel Board*:²⁷

"yet we are here requested to give weight to [a rule] in a controversy that pits the [agency] against an individual member of exactly that class the

APA sought to protect before rules like this are made effective. That, we think, would permit an agency to flout the APA by *penalizing those who were entitled to notice and opportunity to be heard but received neither*. . . . To hold otherwise might help perpetuate the problem of. . . . 'house rules of the agency' [which are promulgated without]. . . . public notice, opportunity to be heard, filing with the Secretary of State, and publication in the [California Code of Regulations]." [Emphasis added.]

Accordingly, OAL concludes that the "*Evaluation Criteria*" created in the Manual, interpret, make specific, and implement the 1988 Act, the Off-Highway Motor Vehicle Recreation Program, because their application will largely decide which applicant will be selected to receive the grants. Requester, in her letter of June 18, 1992, argues that a set of "incomplete or inaccurate evaluating criteria"²⁸ could result in an improper allocation of state funds designed to protect natural resources where the welfare of all citizens of California would be affected.

Example No. 3 ----- "\$5,000 Grant Limit"

The Manual establishes in item 6 of the section entitled, "General Program Information," a monetary threshold of \$5,000 as the *minimum* grant amount an applicant may request from the Department to administer the Off-Highway Motor Vehicle Recreation Program. "*The minimum grant request is \$5,000. The maximum is the amount required to sustain the project for one year ---from implementation to completion.*"²⁹

OAL concludes that the \$5,000 monetary standard, by definition, excludes those applicants who would have wished to make *grant requests of less than \$5,000*, but were precluded by the Department's unexplained decision to establish the monetary threshold.

Furthermore, without the establishment of this monetary limitation, the Department could not evaluate and compare competing grant requests, and accordingly, OAL concludes that the monetary threshold makes specific and aids in implementing the 1988 Act, and directly affects entities outside the Department, and as such should be considered a "regulation" subject to the APA.

Example No. 4 ----- --- Obligations of Grant Recipients"

Under a section of the Manual entitled, "*General Program Information*, the Department describes the seven "obligations" of grant recipients. For example, the Department lists such "obligations" as:

- (A). "The facility must be open for use by 'casual' (non-competitive) OHV recreationalists during reasonable days and hours. . . ." ³⁰
-
- (B). "Grantees are committed to regular operation and maintenance of the facility at a level which will ensure sustained long-term use and conservation of natural values. Failure to do so may require compensation to the State OHV Fund and jeopardize future grant requests." ³¹

Since the creation of these two "obligations" establishes the rights, responsibilities, and, in some cases, the possible penalties for grant recipients, they arguably interpret, implement and make specific the law administered by the Department through a standard of general application that directly affects all persons and entities outside the Department. Accordingly, OAL concludes that these two obligations, as well as others created in the Manual, are "regulations" that are required to be formally adopted pursuant to the APA.

Portions of the Manual, however, do appear to be *restatements of existing law* and accordingly would not be subject to the APA. ³² For example, under the section of the Manual entitled "Grants-Related Enabling Legislation," portions of the applicable legislation are described:

"5090.55. Any moneys in the fund allocated pursuant to subdivisions (a) of Section 5090.61 and not appropriated for local assistance grants pursuant to Section 5090.50, shall be available for appropriation to the division for expenditure pursuant to cooperative agreements with agencies of the United States." ³³

III. DO THE COMPONENTS OF THE MANUAL, FOUND TO BE "REGULATIONS," FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³⁴ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.

A. "Forms" Exception

In its response letter of September 8, 1998, the Department claims that its Manual meets the *exception* provided by the Government Code because:

"the manual is in the nature of a process document and does not establish a rule or standard of conduct for the grant program, the specific grants that may be funded, or how the local or federal agencies are to carry out the specific grants. The manual provides information, steps, and *forms* for completing the application process. . . . The manual, thus, serves in the nature of a request for proposals, analogous to the competitive process for services contracts under the California Public Contract Code. To our knowledge, requests for proposals do not fit within the definition of a regulation as promulgated in Government Code section 11342 subdivision (g)."³⁵ [Emphasis added.]

OAL is guided by a strict interpretation of the APA in determining whether all or parts of the Manual meet one or more of the statutory exceptions provided in Government Code section 11342, subdivision (g):

"Regulation does *not* mean. . . . any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." [Emphasis added.]

The Department has included as a part of its Manual, several Appendices that appear to meet the "form" exception to the definition of a regulation set forth in Government Code 11342, subdivision (g). For example, "*Appendix C, Sample Cost Estimate (1 of 7), Item C, Planning Cost Estimate*,"³⁶ of the Manual appears to provide nothing more than a *suggested* format or template for the preparation of financial information required of the grant applicant.

Additionally, "*Appendix D, Sample Governing Body Resolution, Item, Resolution No. ____*"³⁷ appears to be a *suggested* authorizing "resolution" form used by the applying entity that *may* be used in submitting a request for a "State Off-Highway Vehicle Grant," and as such is exempt from the definition of a "regulation" contemplated by Government Code 11342, subdivision (g).

Other Appendices contained within the Manual *that appear to meet the "form" exception* to the definition of a "regulation", include:

- (1). "Appendix G, General Site Map Example"³⁸
- (2). "Appendix H, General Site Plan Examples"³⁹
- (3). "Appendix I, Sample Sub-Activity Map"⁴⁰

Although the examples cited above appear to fall within the "forms" definition of a "regulation", one form contained within the Manual that does *not* appear to meet the exception to the definition of a "regulation" is "*Appendix K, Division of Off-Highway Motor Vehicle Recreation, Application for State Off-Highway Vehicle Grant*."⁴¹ This form appears to be a standard of general application which is intended to implement the enacting legislation, and is therefore a "regulation" which must be adopted pursuant to the APA.

B. "Contracts" Exception

The Department argues in its response that the Manual is the equivalent of a "Request for Proposal," that is subject to the criteria established under the California Public Contracts Code and is, therefore, exempt from the APA.⁴² Implicit in the Department's argument is the proposition that the Manual, which OAL has determined to be a "regulation," is, nonetheless, shielded from the APA because it is part of a contract. OAL disagrees.

Provisions of a contract, which are rules of general applicability interpreting a statute (or a regulation), are not shielded from APA challenge. There is no express statutory language which provides that agency rules placed in contract provisions are exempt from the APA. Applying Government Code section 11346, which requires that exemptions be expressly stated in statute, OAL presumes that no such exemption exists.

In addition, it appears the Legislature intended that there be no exemption for contract provisions. Exempting public contracts was--and is--a clear policy alternative. The federal APA first enacted in 1946, exempted "*matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts*" (emphasis added) from rulemaking requirements.⁴³ In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "any interpretative rule *or any rule relating to public property, public loans, public grants or public contracts*" (emphasis added) from APA notice and hearing requirements.⁴⁴ It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting rules contained in public contracts from notice and comment requirements.

The APA provides that all parties affected by proposed rulemaking be given the right to a public hearing and an opportunity to comment on proposed rules. Providing an exemption for contract provisions would not be consistent with the basic goals of the APA, i.e., to provide for meaningful public participation in agency decision making. The right to comment would be nullified if an agency were permitted to avoid formal adoption of a rule by merely incorporating it into a contract. While the rights of parties to a contract may be limited by the terms of the contract, it is inherently unjust for such terms to restrict the rights of parties not subject to the contract.⁴⁵

And finally, OAL acknowledges the admission by the Department that the Manual should be submitted to the APA.

"It is not our intention to violate either the letter or the spirit of the Administrative Procedure Act. As such, we will, of course, defer to your judgment in this matter and look forward to your conclusions and guidance. We have commenced a review of the manual and the process with the aim

of adopting them as regulations where determined to be necessary in accordance with the Administrative Procedure Act.”⁴⁶

CONCLUSION


For the reasons set forth above, OAL has concluded that:

1. The APA is generally applicable to the Department.
2. The challenged document, the Manual, had general applicability and made specific the terms of the Off-Highway Motor Vehicle Recreation Act of 1988.
3. Exceptions to the APA requirements apply to limited portions of the Manual.
4. The Manual, with noted exceptions, violates Government Code section 11340.5, subdivision (a).

DATE: October 30, 1998



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ENDNOTES

1. Karen Schambach, P.O. Box 603, Georgetown, CA 95634.

2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part I ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. Government Code section 11342.

4. *See Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (Unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App. 3d 932, 943, 107 Cal.Rptr. 596, 60').

5. Government Code section 11346- Title 1, CCR, section 121 (a)(2).

6. *The Grier Court stated:*

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No.10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in *California Regulatory Notice Register* 96, No. 8-Z, February 23,1996, p. 292.

7. Statutes of 1982, c. 994.

8. Statutes of 1987, c.1027.

9. Public Resources Code, Chapter 1.25, section 5090.01-5090.70 inclusive.

10. Public Resources Code, subdivision 5090.02.
11. Public Resources Code, subdivisions 5090.15-5090.25, inclusive.
12. Public Resources Code, subdivisions 5090.32-5090.36, inclusive.
13. Public Resources Code, section 5090.50.
14. "Application Procedures, Off-Highway Motor Vehicle Recreation Act of 1988, Off-Highway Vehicle Grants Program." ("Manual") approved and signed by Lee J. Chauvet, Deputy Director.
15. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See, *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standards of general application applies to all members of any open class).
16. Public Resources Code, section 5090.50.
17. The Department of Parks and Recreation, P.O. Box 942896, Sacramento, CA 94296-0001, (916) 653-8380, filed a formal response for Docket No. 93-005 in a letter dated September 8, 1998, addressed to Edward G. Heidig, Director, Office of Administrative Law.
18. Department's Response, dated September 8, 1998, p.1.
19. Department's Response, dated September 8, 1998, p.1.
20. Government Code section 11342, subdivision (g).
21. Manual, p.3.
22. Manual, p.13.
23. Manual, p. 13, item 4.
24. *City of San Marcos v. California Highway Commission* (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804.
25. Manual, p.12.
26. Government Code section 11340.5, subdivision (a).
27. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal. Rptr.1
28. Memorandum in Support of Request for Determination, Karen Schambach, dated June 18, 1992, p.7.

29. Manual, p.7, item 6.
30. Manual, p.8 (A).
31. Manual, p. 9 (B).
32. Manual, pp. 1,2.
33. Manual p. 4.
34. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of *the* state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix] *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest) ("*San Joaquin*"); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all

applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission). see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 168-169, 175-177, 197-200. Relying in part on *Grier v. Kizer*, 268 Cal. Rptr. at 253, **1991 OAL Determination No. 6** rejected DDS' contention (which had been based on *San Joaquin*) that a contractual provision cannot be a standard of general application for APA purposes. The primary APA holding of *San Joaquin* was that a "statistical accounting technique" can never be a "regulation" within the meaning of the APA; a possible secondary holding was that a contractual provision previously agreed to by the complaining party is not subject to the APA. *Grier v. Kizer*, upholding **1987 OAL Determination No. 10**, expressly rejected the primary *San Joaquin* holding, noting that this holding appeared to have lost its precedential value due to the subsequent, inconsistent Supreme Court decision in *Armistead*.

35. Department's Response, dated September 8, 1998, p.1.
36. Manual, pp. 37-44, inclusive.
37. Manual, p. 45.
38. Manual, p. 48.
39. Manual, pp. 49-51, inclusive.
40. Manual, p. 52.
41. Manual, p. 61.
42. Department's Response, dated September 8, 1998, p. 1.
43. Title 5, U.S.C. section 553(a)(2).

- 44. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt public contracts from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.
- 45. **1991 OAL Determination No. 6**, p. 176 (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR 91, No. 43-Z, October 25, 1991, p. 1451.
- 46. Department's Response, dated September 8, 1998.